IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 135

SIDNEY FRIEDMAN, *Petitioner,*

v.

PEOPLE OF THE STATE OF NEW YORK

On Petition for a Writ of Certiorari to the Appellate Term of the Supreme Court of New York, First Department

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PETITIONER'S REPLY BRIEF

Petitioner files this Reply Brief in the light of the three decisions of this Court on March 21, 1966—the *Ginzburg, Mishkin* and *Fanny Hill* decisions. Since the Petition for a Writ of Certiorari herein has been held by the Court pending the resolution of those three cases, particularly the *Mishkin* case, it becomes necessary to re-evaluate the questions presented in the Petition.

1. The Questions That Have Been Resolved by the Mishkin Decision.

The decision of this Court in the *Mishkin* case has effectively disposed of two of the three questions presented by the Petition herein—i.e., the First Question as to whether the references to "sadistic" and "masochistic" publications in § 1141 of the New York Penal Law are void for vagueness, and the Third Question as to whether the type of material involved in this and in the *Mishkin* case can be considered obscene under any constitutionally permissible definition of obscenity. But the Second Question presented by the instant Petition, concerning petitioner's constitutional right to a jury determination of the obscenity issue, has in no way been answered or mooted by either the *Mishkin* decision or the *Ginzburg* or *Fanny Hill* decisions. It is a question whose importance and appropriateness for resolution by this Court remain undiluted. And it is a question raised and pending before this Court in the Petition in *Sheperd* v. *New York,* No. 626, Oct. Term 1965.

2. The Unresolved and Important Question as to Petitioner's Constitutional Right to a Jury Determination of the Obscenity of the Publications Sold by Him.

As indicated, none of the opinions rendered by this Court on March 21, 1966, in any way involved or discussed or resolved the Second Question presented by the instant Petition: "Whether a state court conviction of a bookseller for the misdemeanor of having possessed and sold an 'obscene,' 'sadistic,' or 'masochistic' book can be sustained under the Due Process Clause of the Fourteenth Amendment in the absence of any absolute right by the defendant to a jury trial and determination of the alleged obscene, sadistic or masochistic nature of the book."

The intrinsic importance of this question, as the Petition (pp. 16-20) indicates, has been attested to by various members of this Court in the *Kingsley, Times Film* and *Jacobellis* cases. And to the extent that "the circumstances of presentation and dissemination of material" (*Ginzburg,* p. 7) now become relevant to the resolution of the obscenity issue, it becomes all the more important for booksellers, defendants, prosecutors and lower courts to know whether there is a constitutional right, even in the setting of a misdemeanor prosecution, to a jury determination of the various factors involved in an obscenity assessment—including "the circumstances of presentation and dissemination of material."

The appropriateness of this issue for review by this Court is further underscored by the decision of the Sixth Circuit in *Volanski* v. *United States,* 246 F. 2d 842, written by the then Circuit Judge Potter Stewart. The trial in that case had originally been before a federal district judge "without intervention of a jury." 246 F. 2d at 843. Following a reversal of the conviction, due to the judge's error in formulating and applying the test of obscenity, the Sixth Circuit remanded the case for a new trial in these words (246 F. 2d at 845):

> "The question in our opinion is peculiarly one best left for *nisi prius* determination, preferably by a jury. * * * [T]he problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable. We impose such a duty upon a jury * * *, because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of the community. * * *

> '[O]bscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premises, but really a small bit of legislation *ad hoc,* like the standard of care.' *United States* v. *Levine,* 2 Cir., 1936, 83 F. 2d 156, 157. A trial court can best determine 'the present critical point in the compromise between candor and shame at which the community may have arrived here and now.' A trial court, particularly with the aid of a jury, can best determine 'the average conscience of the time.' *United States* v. *Kennerley,* D.C. S.D.N.Y. 1913, 209 F. 119, 121."

Petitioner suggests that these comments, like those of Mr. Justice Brennan in the *Kingsley* case (354 U.S. at 448) and those of Mr. Chief Justice Warren in the *Jacobellis* case (378 U.S. at 201)—both quoted in the Petition at pp. 18-19—effectively dispose of respondent's fear (Memorandum, p. 7) that the standard of obscenity necessarily invokes judgments whose complexities and subtleties far exceed the factual determination traditionally entrusted to a jury. Clearly, this problem deserves the attention of this Court.

Finally, the respondent suggests (Memorandum, p. 4) that petitioner's failure to apply for a jury trial pursuant to Section 32 of the New York Criminal Court Act precludes him from complaining that he was denied any constitutional right to such a trial. But as the Petition itself pointed out (p. 9, fn. 3), the issue was properly raised on appeal in jurisdictional terms; as such, the failure to demand a jury trial at the trial court level did not constitute a waiver of jurisdictional objections stemming from the absence of any *absolute* right to a jury trial. See *People* v. *Nicometi,* 12 N.Y. 2d 428, 431. In the absence of such an absolute right, as

made plain by the provisions of the New York City Criminal Court Act (see Secs. 32 and 40), petitioner claimed on appeal that the New York City Criminal Court, composed as it was of three judges acting without a jury, lacked jurisdiction over the criminal misdemeanor proceeding.* And it was that issue that was heard on the merits and resolved against petitioner by the Appellate Term. The issue was thus properly put into question and resolved.

It should also be noted that precisely the same question has been raised in the pending Petition in *Sheperd* v. *New York,* No. 626, Oct. Term 1965. In that case the petitioners did make application under Section 32 for a certification that their cases be prosecuted by indictment and tried by a jury; that application was denied and petitioners were forced to trial before a three-judge court. Once again the issue was raised on appeal and resolved against those petitioners. The experience in *Sheperd* underscores the absence of any *absolute* right to a jury trial in an obscenity misdemeanor prosecution under the New York City Criminal Court Act and justifies the raising of the issue in the instant case in jurisdictional terms on the appeal. If there is a constitutional and absolute right to have a jury trial in such a case, the three judges had no jurisdiction or power to try an obscenity case consistently with the Due Process Clause of the Fourteenth Amendment.

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*"A statute which does not afford the defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene." Dissent of Mr. Justice Brennan in *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, 448.

The Court, however, may wish to hear and consider the jury trial issue separated from its jurisdictional aspects either (1) by withholding action on the instant Petition until the issue in the *Sheperd* case is argued and resolved, or (2) by consolidating the instant case with the *Sheperd* case for plenary consideration of all aspects of the jury trial question.

CONCLUSION

For the reasons expressed in the Petition and for the further reasons set forth herein, a writ of certiorari should issue to review the judgment below. Such a grant of certiorari, of course, may appropriately be limited to the second question presented in the Petition.

Respectfully submitted,

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March 29, 1966.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

FRIEDMAN *v.* NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE ~~DIVISION~~ TERM OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 7. Decided June 12, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Appellate ~~Division~~ TERM of the Supreme Court of New York, First Judicial Department is reversed. *Redrup* v. *New York,* 386 U. S. ——, decided May 8, 1967.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States,* 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts,* 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.